



THE STATE BAR OF CALIFORNIA

Date: January 13, 2014

To: Members, Regulation, Admissions and Discipline Oversight Committee,
Board of Trustees, State Bar of California
Jenny Fontes, Administrative Assistant II, State Bar Court

From: Jayne Kim, Chief Trial Counsel, Office of the Chief Trial Counsel

Subject: Comments regarding proposed amendments to the Rules of Procedure of the
State Bar of California

On November 18, 2013, the Board of Trustees released and invited comments on proposed amendments to the Rules of Procedure of the State Bar of California. The Office of the Chief Trial Counsel (OCTC) offers the following suggestions, observations and comments on the proposed amendments.

Rule 5.83(H) regarding motions to vacate or set aside defaults

The proposed amendments to the rules of procedure include new language in rule 5.83(H) which provides that a motion to vacate or set aside a default may be granted *upon a showing of good cause*.

However, rule 5.83(C) and (D) require that a member in default make specific showings before the default may be set aside. Under rule 5.83(C), a member must demonstrate mistake, inadvertence, surprise or excusable neglect as those grounds are interpreted under Code of Civil Procedure section 473. Late filed motions, under rule 5.83(D), must be supported by clear and convincing evidence that the member did not learn of the filing of disciplinary charges within the time frame articulated in rule 5.83(C); the member filed his or her motion promptly after learning of the disciplinary charges; and the failure to timely respond to the disciplinary charges is excused by compelling circumstances beyond the member's control.

OCTC believes that the standards set forth in rule 5.83(C) and (D) are important and should be maintained because they clearly and meaningfully address the level of delinquency of the member in default. That is, members who find themselves in default legitimately due to excusable neglect or circumstances beyond their control should be afforded relief, those who do not should not be granted relief.

The proposed new language providing that a motion to vacate or set aside a default may be granted *upon a showing of good cause* suggests a new or alternative standard of proof inconsistent or at odds with the requirements of rule 5.83(C) and (D).

Consideration should be given to clarifying or deleting the *upon a showing of good cause* amendment to rule 5.83(H).

Rule 5.85(F)(1)(d) regarding rulings on Petitions for Disbarment After Default

Consideration should be given to clarifying two aspects of the proposed amendments to rule 5.85(F)(1)(d).

First, the language *the factual allegations deemed admitted in the notice of disciplinary charges or pursuant to the notice of hearing on conviction* is potentially confusing.

Rule 5.346(B) provides that for purposes of rule 5.85, references to *factual allegations deemed admitted* are to be treated as references to the factual allegations set forth in OCTC's statement of facts and circumstances surrounding a conviction. The language *or pursuant to the notice of hearing on conviction* in rule 5.85(F)(1)(d) is unnecessary. It is also potentially confusing because it suggests the existence of facts in a notice of hearing where there are none. (As opposed to, for example, the transmittal of a record of conviction which includes evidence of an underlying conviction, Bus. & Prof. Code section 6101(a).)

The confusion could be eliminated by deleting *or the notice of hearing on conviction* or replacing that language with *The Office of the Chief Trial Counsel's statement of facts and circumstances surrounding a conviction*.

Second, rule 5.85(F)(1)(d) speaks to factual allegations that *support a finding that the member violated a statute, rule or court order that would warrant the imposition of discipline*. The language *or engaged in an act or acts of moral turpitude or other misconduct warranting discipline* could be added here to specifically address the legal conclusions found in support of the imposition of discipline in conviction matters.

Rule 5.231 regarding the timing of a Decision on Applications for Involuntary Enrollment

The proposed amendment to rule 5.231 includes extending the time period within which the Hearing Department must file a decision on applications for the involuntary inactive enrollment of a member from 10 days to 30 days.

Given the threat of harm addressed in proceedings filed under Business and Professions Code section 6007(c) and the expedited nature of those proceedings (rule 5.229), OCTC suggests that the time frame for the filing of a decision in such matters be no longer than 20 days.

OCTC appreciates the opportunity to comment on the proposed amendments to the rules of procedure.